Editor's note: Appealed -- remanded, Civ. No. A-76-26 (D.Alaska Nov. 30, 1976; dismissed, No. 77-2072 (9th Cir. Dec. 11, 1978) 587 F.2d 996

HELDINA ELUSKA

IBLA 75-329 Decided August 11, 1975

Appeal from a decision by the Alaska State Office, Bureau of Land Management, rejecting in part Native allotment application F-17544.

Affirmed.

1. Alaska: Native Allotments

   An applicant under the Alaska Native Allotment Act does not have a due process "right" under the Constitution to a hearing before an Administrative Law Judge on the rejection of her application in whole or in part.

2. Alaska: Native Allotments

   The requirement of "substantially continuous use and occupancy of the land for a period of five years" applies to all applicants under the Alaska Native Allotment Act, regardless of where the land is situated. Such five-year period must be completed prior to the time the land was withdrawn by the Alaska Native Claims Settlement Act.

3. Alaska: Native Allotments

   Where a Native allotment applicant has had an adequate opportunity to submit her own evidence of use and occupancy, but has failed to do so, a decision rejecting the application in part because of inadequate use and occupancy may be upheld.

APPEARANCES: Michael J. Frank, Esq., of Alaska Legal Services Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Pursuant to the Alaska Native Allotment Act of May 17, 1906, 43 U.S.C. § 270-1 (1970) (repealed by 43 U.S.C. § 1617 (Supp. III 1973)), Heldina Eluska filed Native allotment application F-17544 with the Bureau of Indian Affairs on March 31, 1971. The application covered two separate parcels of land (parcels A and B) of approximately 80 acres each. Following submission to the Alaska State Office, Bureau of Land Management (BLM), a field examination was conducted on each parcel and appellant introduced various affidavits and statements of occupation and use. On December 26, 1974, BLM approved appellant's application for parcel B but rejected her application for parcel A. This appeal is taken from that part of the BLM decision rejecting her application for parcel A.

Appellant presents six arguments for reversal of the BLM decision. We do not find merit in any of the arguments presented and must deny appellant's appeal.

[1] Appellant argues that she has a due process "right" under the Constitution to a hearing before an Administrative Law Judge. The United States District Court for the District of Alaska has recently examined this question and ruled that no such "right" exists with regard to applications under the Act of May 17, 1906, supra. Pence v. Morton, Civil No. A74-138 (D. Alas. April 8, 1975). We concur with this ruling. Beulah Moses, 21 IBLA 157 (1975). There is no "right" to such a hearing on the rejection of a Native allotment application in whole or in part. Appellant's demand for a hearing is denied.

[2] Appellant argues that 43 U.S.C. § 270-3 (1970) which requires a person to prove "substantially continuous use and occupancy of the land for a period of five years" in order to receive an allotment refers only to allotments which are within national forests, as described in 43 U.S.C. § 270-2 (1970). The Act itself, both as originally passed by Congress and as amended in 1956, gives to the Secretary of the Interior the discretionary authority to prescribe the "rules" for granting Native allotments. 1/ The requirement of use and occupancy for five years has been such a "rule" since 1935. 55 I.D. 282, 285 (1935); see 43 CFR 67.13 (1938 ed.). This

1/ "The Secretary of the Interior is authorized and empowered in his discretion and under such rules as he may prescribe, to allot * * *." 43 U.S.C. § 270-1 (1970).

regulation has been continued until the present, although amended from time to time. See 43 CFR 67.10 (1954 ed.); 43 CFR 67.7 (1961 Supp.); 43 CFR 2212.9-4 (1967 ed.); 43 CFR 2561.2 (1974 ed.). This regulation has clearly applied to all lands for which Native allotment applications might be made. The legislative history of the 1956 amendment to the Native Allotment Act clearly shows that Congress was aware of this regulatory requirement and other Departmental regulations pertaining to Native allotments. See H.R. REP. NO. 2534, 84th Cong., 2d Sess. (June 29, 1956); Louis P. Simpson, 20 IBLA 387, 399 (1975) (Concurring Opinion). By the 1956 Amendment to the Native Allotment Act, Congress sanctioned and ratified the regulatory requirement that the five years of substantially continuous use and occupancy be shown for all allotment applications. There is thus no merit to appellant's contention, in effect, that a Native allotment applicant for non-forest lands need not show five years of substantial continuous use and occupancy. The requirement pertains to all Native allotment applicants.

Appellant argues that under 43 CFR 2561.2 she has six years from her initial filing to meet the requirements of proof and occupancy. However, the lands in question here were among those withdrawn by Public Land Order 5184, 37 F.R. 5587 (March 16, 1972), under the authority of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610 (Supp. III, 1973). We have consistently held that a person must complete his five-year period of use and occupancy prior to the effective date of a withdrawal or his application will be rejected. Susie Ondola, 17 IBLA 359 (1974), and cases cited therein. Therefore, appellant's argument for additional time must fail.

[3] Appellant's remaining arguments are concerned with the procedures used by BLM in determining the validity of her claim. She decries the "immense burden of proof" placed upon an applicant, argues that the field examiner's report was in error and demands a new field examination under guidelines established on July 30, 1974, by the Department of the Interior. We cannot agree.

The burden of proof required of applicants is certainly not "immense." Appellant here was able to overcome the initial rejection by BLM of part of parcel B by submitting two affidavits. With regard to errors in the field examination, appellant had more than 90 days to submit proof of her use and occupancy of parcel A. Within that time she did submit additional evidence concerning parcel B but failed to submit anything concerning parcel A. We find nothing in the file to indicate that appellant was faced with any particular difficulties in submitting such evidence for parcel A. Therefore, BLM was justified in its reliance on the field examination report. We can find no basis upon which to order a new field examination.

Appellant has made no submission of proof or offer of proof which would justify further proceedings in this case. See Beulah Moses, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Martin Ritvo
Administrative Judge